

The opinion in support of the decision being entered today was **not** written
for publication and is **not** binding precedent of the Board.

Paper No. 33

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte WILLIAM VANDERMINDEN

Appeal No. 2002-1613
Application No. 09/126,194

HEARD: February 19, 2003

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PAT. & T.M. OFFICE
BOARD OF PATENT APPEALS
AND INTERFERENCES

Before ABRAMS, STAAB, and NASE, Administrative Patent Judges.
ABRAMS, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1-7,
9-11, 13, 15-21, 23 and 24. Claims 8, 12, 14 and 22 have been indicated as containing
allowable subject matter.

We AFFIRM-IN-PART.

BACKGROUND

The appellant's invention relates to a knock-down cart. An understanding of the invention can be derived from a reading of exemplary claim 1, which has been reproduced below.

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Harrah	1,087,878	Feb. 17, 1914
DePuy <u>et al.</u> (DePuy)	2,720,402	Oct. 11, 1955
Burnett	3,099,356	Jul. 30, 1963
Holtz	3,215,096	Nov. 2, 1965
McClellan	3,295,475	Jan. 3, 1967
Carlile	4,865,346	Sep. 12, 1989
Fuller	5,308,012	May 3, 1994

The following are the standing rejections:¹

- (1) Claims 1, 2 and 18 under 35 U.S.C. § 102(b) as being anticipated by Harrah.
- (2) Claims 1-3 and 18 under 35 U.S.C. § 102(b) as being anticipated by Holtz.
- (3) Claims 1, 2, 13 and 18 under 35 U.S.C. § 102(b) as being anticipated by McClellan.
- (4) Claims 5, 6, 10 and 19 under 35 U.S.C. § 103(a) as being unpatentable over Holtz in view of DePuy.
- (5) Claims 4 and 20 under 35 U.S.C. § 103(a) as being unpatentable over Holtz in view of Carlile.

¹Rejections of claims 1-17 under 35 U.S.C. § 112, second paragraph, and of claims 1-3 and 18 under 35 U.S.C. § 102(b) as being anticipated by Berthier, were withdrawn in the Answer (pages 3 and 7).

- (6) Claims 7, 11, 13 and 21 under 35 U.S.C. § 103(a) as being unpatentable over Holtz in view of Burnett.
- (7) Claims 5, 10, 11, 15-17, 19, 21 and 24 under 35 U.S.C. § 103(a) as being unpatentable over McClellan in view of DePuy.
- (8) Claims 9 and 23 under 35 U.S.C. § 103(a) as being unpatentable over McClellan in view of Fuller.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted rejections, we make reference to the Answer (Paper No. 27) for the examiner's complete reasoning in support of the rejections, and to the Brief (Paper No. 26) and Reply Brief (Paper No. 28) for the appellant's arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellant's specification and claims, to the applied prior art references, and to the respective positions articulated by the appellant and the examiner. As a consequence of our review, we make the determinations which follow.

Claim 1

A knock-down portable bar cart comprising:

a body frame;

a pair of leg frames, each leg frame being releaseably connected to said body frame at an opposite side from the other of said leg frames to support said body frame on a support surface; and

a table top releaseably connected to and across said leg frames in vertically spaced relation to said body frame.

The Rejections Under Section 102

The guidance provided by our reviewing court with regard to the matter of anticipation is as follows: Anticipation under 35 U.S.C. § 102(b) is established only when a single prior art reference discloses, either expressly or under the principles of inherency, each and every element of the claimed invention. See In re Paulsen, 30 F.3d 1475, 1480-1481, 31 USPQ2d 1671, 1675 (Fed. Cir. 1994) and In re Spada, 911 F.2d 705, 708, 15 USPQ2d 1655, 1657 (Fed. Cir. 1990). Anticipation by a prior art reference does not require either the inventive concept of the claimed subject matter or recognition of inherent properties that may be possessed by the reference. See Verdegaal Brothers Inc. v. Union Oil Co. of California, 814 F.2d 628, 633, 2 USPQ2d 1051, 1054 (Fed. Cir. 1987). Nor does it require that the reference teach what the applicant is claiming, but only that the claim on appeal "read on" something disclosed in the reference, *i.e.*, all limitations of the claim are found in the reference. See Kalman v. Kimberly-Clark Corp., 713 F.2d 760, 772, 218 USPQ 781, 789 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1026 (1984).

(1)

Claims 1, 2 and 18 stand rejected as being anticipated by Harrah, which discloses a wheeled cart comprising a tray 19 attached to a pair of support elements 20

which in turn are pivotally attached to a pair of crossed leg structures 1 and 2. In the course of setting forth this rejection, the examiner finds elements 20 of Harrah to be the claimed "body frame," and table 19 to be "in vertically spaced relation to said body frame" because it is located above elements 20 (Answer, page 6) when the device is in the upright position (Figures 1 and 2). The appellant argues that the unconnected support elements 20 do not constitute "a body frame," and that tray 19 is not "in vertically spaced relation" to elements 20.

It is our view that even assuming, arguendo, that the spaced pair of elements 20 constitute "a body frame," we agree with the appellant that Harrah's tray 19 is not vertically spaced² from elements 20. This being the case, all of the subject matter recited in claim 1 is not disclosed or taught by Harrah, and this rejection of claim 1 cannot be sustained. It then follows that we also will not sustain the like rejection of claim 2, which depends from claim 1, or of independent claim 18, which also contains this limitation.

²The common applicable definition of "spaced" is "with space between." See, for example, Webster's New Collegiate Dictionary, 1973, page 1113.

(2)

Claims 1-3 and 18 stand rejected as being anticipated by Holtz. We will sustain this rejection. Our reasoning follows.

Using the language of claim 1 as a guide, Holtz discloses a knock-down (see Figure 3; column 2, lines 33-55) portable bar cart. The cart comprises a body frame (56), a pair of leg frames (10 and 12) releaseably connected to the body frame, and a table top (40) releaseably connected to the leg frames in vertically spaced relation to the body frame. Leg frames 10 and 12 each are connected to the body frame "at an opposite side from the other of said leg frames," as is required by the claim. The fact that these frames additionally are connected to the same sides of the body frame is not prohibited by the language of the claim, that is, claim 1 does not limit each leg frame to being connected only to one side of the body frame, and it is well settled that the use of the term "comprising" in a claim opens the claim to inclusion of structure in addition to that recited in the claim. See In re Hunter, 288 F.2d 930, 932, 129 USPQ 225, 226 (CCPA 1961). In addition, we consider Holtz's table top 40 to be connected "across" the leg frames because it meets the common applicable definition of that term,³ further

³The common applicable definitions of "across" are "in a position reaching from one side to the other" and "from one side to the opposite side." See, for example, Webster's New Collegiate Dictionary, 1973, page 11.

noting, with regard to the appellant's argument on this issue, that claim 1 does not require that the table top rest upon the tops of the leg frames.

The appellant has not separately argued that claim 2 is not anticipated by Holtz, and therefore this claim falls with claim 1, from which it depends. Claim 3 has been grouped by the appellant with claim 2 (Brief, page 6), and thus it falls with claim 2.

This rejection of independent claim 18 is sustained on the basis of the same reasoning that was applied above against claim 1, considering further that the appellant has not argued that element 56 of Holtz is not of "box-shaped skeletal structure."

(3)

The examiner's third Section 102 rejection is that independent claims 1 and 18, and dependent claims 2 and 13, are anticipated by McClellan. We do not agree, and therefore will not sustain this rejection.

McClellan discloses a knock-down table. The examiner reads "a body frame" in independent claims 1 and 18 on the spaced channel members 24 of McClellan, which are "secured to the lower surface 22" of the table top 20 (column 2, lines 25-28). As was the case with Harrah, even if channel members 24 are considered to constitute the

claimed "body frame," the rejection is fatally defective in that the table top is not in "vertically spaced relation" to the channel members, as is recited in these claims.⁴

The Rejections Under Section 103

The test for obviousness is what the combined teachings of the prior art would have suggested to one of ordinary skill in the art. See, for example, In re Keller, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981). In establishing a prima facie case of obviousness, it is incumbent upon the examiner to provide a reason why one of ordinary skill in the art would have been led to modify a prior art reference or to combine reference teachings to arrive at the claimed invention. See Ex parte Clapp, 227 USPQ 972, 973 (Bd. Pat. App. & Int. 1985). To this end, the requisite motivation must stem from some teaching, suggestion or inference in the prior art as a whole or from the knowledge generally available to one of ordinary skill in the art and not from the appellant's disclosure. See, for example, Uniroyal, Inc. v. Rudkin-Wiley Corp., 837 F.2d 1044, 1052, 5 USPQ2d 1434, 1439 (Fed. Cir.), cert. denied, 488 U.S. 825 (1988).

(4)

Claims 5, 6, 10 and 19 have been rejected as being unpatentable over Holtz in view of DePuy. Holtz has been discussed above, where we sustained the rejection of independent claims 1 and 18 as being anticipated by this reference. Claims 5, 10 and

⁴In the event of further prosecution of this application, the examiner should consider designating H-shaped member 60 as "a body frame" that is in vertically spaced relationship with the table top.

19 add to the independent claims the requirements of a pair of vertically disposed spacers "at each corner of said body frame, and that each leg frame includes a vertical plate at each side thereof" to interact to effect a releasable connection between each leg frame and the body frame.

The examiner has applied DePuy for teaching this attachment means, stating that "the examiner takes Official Notice of the equivalence of the claimed plate with slots and the disclosed clips [of Holtz] for their use in the connection art and the selection of any of these known equivalents to provide a releasable connection would be within the level of ordinary skill in the art" (Answer, pages 9 and 10). The examiner has not explained what structure of DePuy is deemed to be relevant to this conclusion, nor has evidence been provided regarding the finding of equivalency. It appears to us that the only structure of DePuy that can be considered to be "slots" are the openings as shown in Figure 6 (defined by bracket 13, 14), but these openings do not interact with spacers but with the frame 12 itself and are not vertically oriented, as required by these claims. This being the case, we agree with the appellant that even if the proposed combination of references were made, there is no teaching which would direct the result to be the structure recited in claims 5, 10 and 19.

We further note that in the Holtz cart the legs are not attached to the corners of the body frame, and therefore this structural requirement of claims 5, 10 and 19 also is

lacking in the primary reference. Nor, for that matter, are the legs of the DePuy serving cart attached to the corners of the trays, one of which must be considered to be a body frame. Thus, the evidence adduced by the examiner also fails to teach this feature of claims 5, 10 and 19.

With regard to both of the preceding two paragraphs, the examiner has not explained why one of ordinary skill in the art would have been motivated by the teachings of DePuy to modify the Holtz cart in such a manner as to meet the terms of these claims and, from our perspective, the only suggestion for doing so resides in the hindsight afforded one who first viewed the appellant's disclosure.

The combined teachings of Holtz and DePuy do not establish a prima facie case of obviousness with regard to the subject matter recited in claims 5, 10 and 19, or in claim 6, which depends from claim 5, and we will not sustain this rejection.

(5)

Claims 4 and 20 stand rejected as being unpatentable over Holtz and Carlile, the latter being cited for teaching "a pair of guides on two opposite sides of said body frame to define a recess with one other side of said body frame to receive a cooler therein," as is set forth in these claims. As the appellant has pointed out, Carlile teaches providing recesses in the surface of a tray to receive corresponding legs of a cooler. However,

incorporation of such structure into the Holtz serving cart would not result in the structure recited in claims 4 and 20, and therefore this rejection cannot be sustained.

(6)

Claims 7, 11 and 13, which ultimately depend from claim 1, and claim 21, which depends from claim 18 through claim 19, stand rejected as being unpatentable over Holtz in view of Burnett. These claims add to the basic structure "a pair of outwardly disposed arms" on the leg members upon which the table top rests. The examiner finds the "outwardly turned arms" to be brackets 15 of Burnett. However, from our perspective, brackets 15 actually are inwardly turned with respect to the leg members. This rejection therefore is fatally defective on its face, and it cannot be sustained.

(7)

Claims 5, 10, 11, 15-17, 19, 21 and 24 have been rejected on the basis of McClellan in view of DePuy. We found above that McClellan fails to disclose or teach all of the subject matter recited in independent claims 1 and 18, and therefore did not anticipate these claims. Considering McClellan in the light of Section 103 does not alter this conclusion. Nor do the teachings of DePuy overcome the shortcomings in McClellan with regard to the subject matter of claims 1 and 18, from which the claims recited in the instant rejection depend. This being the case, the rejection of claims 5,

10, 11, 15-17, 19, 21 and 24 as being unpatentable over McClellan in view of DePuy cannot be sustained.

(8)

Claims 9 and 23 stand rejected on the basis of the combined teachings of McClellan and Fuller. As was the case immediately above, the deficiencies in McClellan with regard to the subject matter recited in independent claims 1 and 18 are not overcome by further consideration of Fuller. This rejection is not sustained.

The Appellant's Arguments

We have carefully considered all of the appellant's arguments as they apply to the rejection we have sustained. However, they have not persuaded us that the examiner's findings with regard to this rejection was in error, and our position with regard to the arguments should be apparent from the discussion of the rejection provided above.

CONCLUSION

The rejection of claims 1, 2 and 18 as being anticipated by Harrah is not sustained.

The rejection of claims 1-3 and 18 as being anticipated by Holtz is sustained.

The rejection of claims 1, 2, 13 and 18 as being anticipated by McClellan is not sustained.

The rejection of claims 5, 6, 10 and 19 as being unpatentable over Holtz in view of DePuy is not sustained.

The rejection of claims 4 and 20 as being unpatentable over Holtz in view of Carlile is not sustained.

The rejection of claims 7, 11, 13 and 21 as being unpatentable over Holtz in view of Burnett is not sustained.

The rejection of claims 5, 10, 11, 15-17, 19, 21 and 24 as being unpatentable over McClellan in view of DePuy is not sustained.

The rejection of claims 9 and 13 as being unpatentable over McClellan in view of Fuller is not sustained.

A rejection of claims 1, 2, 3 and 18 having been sustained, the decision of the examiner is affirmed-in-part.

No time period for taking any subsequent action in connection with this appeal
may be extended under 37 CFR § 1.136(a).

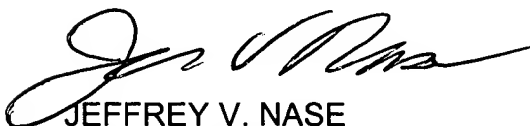
AFFIRMED-IN-PART



NEAL E. ABRAMS
Administrative Patent Judge



LAWRENCE J. STAAB
Administrative Patent Judge



JEFFREY V. NASE
Administrative Patent Judge

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FRANCIS C. HAND
CARELLA, BYRNE, BAIN, GILFILLAN,
CECCHI, STEWART & OLSTEIN
SIX BECKER FARM ROAD
ROSELAND, NJ 07068